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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VINOD C. BHAN, CRNA,
Petitioner,

v.

NME HOSPITALS, INC.,
NATIONAL MEDICAL ENTERPRISES, INC.
and JOHN E. MENAUGH,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Vinod C. Bhan ("Petitioner") petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 25, 1991. *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404 (9th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3295 (U.S. Sept. 30, 1991) (No. 91-575). The Ninth Circuit's decision affirmed an order of the United States District Court for the Eastern District of California granting summary judgment in favor of Respondents NME Hospitals, Inc., National Medical Enterprises, Inc. and John E. Menaugh ("Respondents"). *Bhan v. NME Hospitals, Inc.*, 669 F. Supp. 998 (E.D. Cal. 1987).

The complaint in this action stemmed from a decision by Manteca Hospital ("the hospital") not to renew an exclusive contract for the provision of anesthesia services in favor of an open staff anesthesiologist ("MDA")-only arrangement. This decision followed ongoing complaints by the hospital's surgeons concerning the lack of twenty-four hour coverage by MDAs under the contract, and the realization that the hospital could not support more than two anesthesia providers. The hospital's decision not to renew that exclusive contract had the effect of excluding Mr. Bhan, who is not an MDA and was employed by the party enjoying the exclusive contract, from providing anesthesia services at the hospital. Petitioner alleges violations of section 1 of the Sherman Act, 15 U.S.C. § 1 (1988), arising out of the hospital's implementation of the MDA-only policy.

Petitioner seeks review from the Ninth Circuit's decision affirming the grant of summary judgment in favor of Respondents solely on the grounds that the court erred in applying the rule of reason rather than the *per se* rule to evaluate his claim of a group boycott.[1] Petitioner asserts that the Ninth Circuit's decision conflicts with the precedents of this Court and with decisions of the Third and Seventh Circuits.

Respondents submit this opposition to the petition for certiorari pursuant to Rule 15 of the Supreme Court rules to address certain misstatements of fact and law

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[1] The Court has determined that certain agreements "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Agreements in the second category are subject to a balancing test—the rule of reason—used to determine whether their procompetitive virtues outweigh any anticompetitive effects. *Id.* at 691.

set forth in Petitioner's brief. As discussed below, Petitioner relies upon inapplicable precedent, attempts to contrive a conflict among the circuits that does not exist, and misapplies the decisions of this Court.

REASONS FOR DENYING THE WRIT

I. PETITIONER IGNORES EXISTING LAW ON GROUP BOYCOTTS AND RELIES UPON INAPPLICABLE PRECEDENT

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), this Court squarely addressed the issue whether group boycotts or concerted refusals to deal are subject to the *per se* rule. The plaintiff in *Northwest Wholesale Stationers* challenged, on a *per se* group boycott theory, its expulsion from a purchasing cooperative. The Court unanimously accepted the plaintiff's characterization of the defendant's conduct as a group boycott, or a concerted refusal to deal, but refused to apply *per se* analysis to that conduct. More specifically, the Court found that "[u]nless the [group engaging in the boycott] possesses market power . . . the conclusion that expulsion is virtually always likely to have an anticompetitive effect"—the conclusion upon which the *per se* rule is premised—"is not warranted." *Id.* at 296 (citations omitted). The Court therefore established that absent a threshold showing of market power on the part of the alleged conspirators, the *per se* rule may not be invoked. Accordingly, *Northwest Wholesale Stationers* implicitly overrules any previous decisions uniformly applying the *per se* rule to all group boycotts. *See Rickards v. Canine Eye Registration Foundation, Inc.*, 783 F.2d 1329, 1333 (9th Cir.) ("While there is some older case law suggesting that group boycotts are per se violations of section 1, the Supreme Court's most recent pronouncement on concerted refusals to deal [*Northwest Wholesale Stationers*] requires that we look to the type of boycott at issue to

determine if per se condemnation is required."), *cert. denied*, 479 U.S. 851 (1986) (citations omitted).

Petitioner ignores this Court's more recent precedent in arguing that the Ninth Circuit's decision refusing to apply the *per se* rule to the alleged group boycott is at odds with *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the rationale of which Petitioner claims was reaffirmed in *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991). As noted above, *Northwest Wholesale Stationers* implicitly overruled previous decisions that categorized group boycotts as *per se* unlawful without an initial market power inquiry. *Klor's*, which held that "[g]roup boycotts, or concerted refusals by traders to deal . . . have long been held to be in the forbidden [*per se*] category" is one such decision. 359 U.S. at 212 (footnote omitted).

Petitioner's reliance on *Pinhas* is entirely misplaced. He argues that *Pinhas* stands for the proposition that the *per se* rule should apply to any "conspiracy which misuses a 'gateway that controls access to the market for [plaintiff's] services.'" Pet'rs Br. at 7-8. The Court's decision in *Pinhas* did not address the merits of the plaintiff's boycott allegations. These allegations were examined in the context of a motion to dismiss the pleadings for failure to satisfy the jurisdictional interstate commerce requirement of the Sherman Act. *Pinhas*, 111 S. Ct. 1842. The Court simply assumed the truth of the facts alleged in the plaintiff's complaint. *Id.* at 1845.[2] Accordingly, the

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[2] Indeed, the quote from *Pinhas* upon which Petitioner relies is taken out of context. The Court's reference to the "gateway that controls access to the market," Pet'rs Br. at 7, is not a substantive assessment of the plaintiff's group boycott theory, but rather a summary of the plaintiff's characterization of the facts alleged in the complaint:

> The case involves an alleged restraint on the practice of ophthalmological services. The restraint was accomplished by an alleged misuse of a congressionally regulated peer review

Court's holding in *Pinhas* was limited to the issue whether the plaintiff's conspiracy and group boycott allegations satisfied the jurisdictional requirement of an effect on interstate commerce. *Id.* at 1847-48. The Court's analysis of that issue does not include a substantive review of the merits of the complaint to determine whether a group boycott is properly analyzed under either the *per se* rule or the rule of reason.

As discussed above, this issue is squarely addressed in *Northwest Wholesale Stationers*, which Petitioner apparently elected to ignore.[3] The Ninth Circuit correctly relied upon *Northwest Wholesale Stationers* in concluding that the conspiracy theory in this action, i.e., that physicians conspired with the hospital to allow only physicians—rather than non-physician providers—to offer services in a particular area, "does not appear to be one that is always anti-competitive." *Bhan*, 929 F.2d at 1412 (footnote omitted). Accordingly, the Ninth Circuit correctly applied the rule of reason.

II. PETITIONER ATTEMPTS TO CONTRIVE A NON-EXISTENT CONFLICT AMONG THE CIRCUITS

Petitioner asserts that the Ninth Circuit's ruling conflicts with a decision of the Third Circuit in *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985). Specifically, Petitioner relies upon *Weiss* for the proposition that once an action can be

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process, *which respondent characterizes* as a gateway that controls access to the market for his services.

Id. at 1848 (emphasis added; footnote omitted).

[3] Although the Court's more recent decision in *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) confirmed the applicability of *per se* analysis to certain types of boycotts, it did so in a context where the boycott at issue was inextricably linked to price-fixing—a *per se* restraint of trade. A boycott implemented to enforce a naked restraint could therefore be condemned on the basis of *per se* analysis without an explicit finding of market power. No such naked restraint exists in the instant case.

characterized as a group boycott or concerted refusal to deal, it is considered *per se* unlawful under section 1. 745 F.2d at 818; Pet'rs Br. at 11-12. *Weiss* was decided in 1984, one year prior to this Court's decision in *Northwest Wholesale Stationers.* As discussed above, *Northwest Wholesale Stationers* explicitly held that not all group boycotts or concerted refusals to deal are considered *per se* unlawful. Accordingly, the language relied upon by Petitioner from *Weiss* has been overruled by this Court.

In a further attempt to contrive a conflict among the circuits, Petitioner contends that the Ninth Circuit's analysis of the alleged group boycott included "an imagined 'patient care' difference." Pet'rs Br. at 15. Petitioner refers to footnote 7 of the Court's decision, where it noted two possible factual differences between this action and *Hahn v. Oregon Physicians' Service*, 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989), one of which was that "quality of care" could not possibly be an issue in *Hahn. Bhan*, 929 F.2d at 1412 n.7. This was the Court's only reference to the term "quality of care" and was clearly not a factor in its conclusion that the alleged group boycott should be analyzed under the rule of reason.[4] Accordingly, Petitioner's attempt to set up a conflict with the Seventh Circuit's decision in *Wilk v. American Medical Association*, 895 F.2d 352, 362 (7th Cir.), *cert. denied sub nom.* 111 S. Ct. 2621

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[4] In concluding that the hospital's policy to replace non-physician providers of anesthesia services with physician providers was not an activity that appears always to be anticompetitive, the court observed that such a policy could make the hospital a more efficient provider of services which would allow it to compete more effectively against other hospitals. *Id.* at 1412. This aspect of the court's analysis is not premised on quality of care concerns. It is simply an economic observation that the MDA-only policy *could* have the effect of making the hospital a more efficient provider of higher quality services, thereby enhancing its competitive position in the market. Such a showing, however, was not necessary to support summary judgment for respondents given the absence of evidence of anticompetitive effects in a properly defined relevant market.

(1990) should be disregarded and is not a basis for review of the Ninth Circuit's decision.

III. PETITIONER MISAPPLIES THE ANALYSIS OF *FTC v. INDIANA FEDERATION OF DENTISTS*

Petitioner further criticizes the Ninth Circuit's opinion for acknowledging, but failing to "apply the teachings of," *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). Petitioner asserts that the Court erred in declining to employ the "quick look" test propounded in *Indiana Federation of Dentists*, opting instead for a thorough market analysis of the alleged restraint. Petitioner fails to recognize a crucial distinction between the allegations and proof in *Indiana Federation of Dentists* and the evidence in the record here.

In *Indiana Federation of Dentists*, the Court found evidence that a group of horizontal competitors—the dentists—had entered into an agreement "to withhold from their customers a particular service that they desire." *Id.* at 459. In other words, the Court had before it evidence of both an agreement, and anticompetitive effects resulting from that agreement. Given this evidence, the Court truncated its rule of reason analysis and focused on an inquiry into whether the dentists could demonstrate "some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services." *Id.* (citations omitted). Finding no such procompetitive benefit, the Court concluded that

> [the FTC's] finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.

Id. at 461 (footnote omitted). In short, the Court found it unnecessary to engage in an elaborate analysis of the

relevant market given that the FTC had provided persuasive evidence of an agreement that had the effect of reducing competition.

No such evidence exists in the record of this action. The Ninth Circuit found that Petitioner failed to meet his initial burden of showing that the hospital's MDA-only policy "substantially restrains competition." *Bhan*, 929 F.2d at 1413. This deficiency stemmed largely from Petitioner's failure to consider essential market definition issues. *Id.* Accordingly, the court concluded that the challenged policy does not violate section 1.

Petitioner makes the bald assertion that the Ninth Circuit's opinion fails to acknowledge that the hospital's MDA-only policy resulted in the exclusion of a "class of lower-priced competitors," thereby "inherently" reducing competition at the hospital. Pet'rs Br. at 19. This claim of anticompetitive effects is unsubstantiated in two respects. First, Petitioner's statement presumes that a purported reduction in competition at this individual hospital constitutes cognizable harm under the antitrust laws. Anticompetitive effects must be measured in the context of a properly defined relevant market. The Ninth Circuit appropriately concluded that Petitioner had failed to produce sufficient evidence that the market in which hospitals compete for anesthesia services could be limited to the town of Manteca. Instead, the court found that "[a]nesthesia services available to hospitals could easily extend beyond the limits of Manteca. Hospitals may acquire them from hundreds of miles away." *Bhan*, 929 F.2d at 1413. With respect to Petitioner's claim of a one hospital market, the court concluded: "The only actual effect shown is that one nurse anesthetist no longer works at one hospital. This alone is not enough to demonstrate actual detrimental effects on competition." *Id.* at 1414 (footnote omitted).

The second flaw in Petitioner's statement of anticompetitive effects is its premise that non-physician providers

of anesthesia services are the "lower-priced competitors." Pet'rs Br. at 19. The record in this proceeding is directly at odds with Petitioner's premise. The record before the Ninth Circuit demonstrates that (1) there was no evidence that the rate charged for petitioner's services "was ever lower than the rate charged for the services of an M.D. anesthesiologist"; and (2) after the non-renewal of the contract held by petitioner's anesthesia services group and implementation of the MDA-only policy, "the cost of anesthesia services at Manteca Hospital dropped." *Bhan*, 669 F. Supp. at 1010. In sum, there is no basis for Petitioner's assertion that the relevant market is limited to Manteca Hospital. Even assuming Petitioner could produce such evidence, however, the record demonstrates that the theoretical danger of excluding "lower-priced competitors" has no application to this case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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